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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 DAVID B. DURAN,
11 Plaintiff,

12 v.

13 OMAR MANDUJO, et al.,
14 Defendants.
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Case No. 15-cv-2745 DMS (WVG)

**ORDER (1) ADOPTING
MAGISTRATE JUDGE'S
REPORT AND
RECOMMENDATION AND (2)
GRANTING MOTION TO
DISMISS FOR FAILURE TO
STATE A CLAIM**

[ECF NOS. 91, 104]

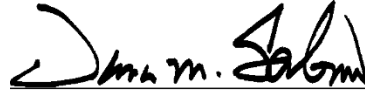
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18 On December 7, 2015, Plaintiff David B. Duran, a state prisoner proceeding
19 *pro se* and *in forma pauperis*, filed a civil rights Complaint pursuant to 42 U.S.C. §
20 1983. On May 19, 2017, Plaintiff filed his Fourth Amended Complaint ("FAC").
21 On June 2, 2017, Defendants Larry Lewis and Jonta Yancy filed a Motion to Dismiss
22 for Failure to State a Claim. On August 31, 2017, Magistrate Judge William V.
23 Gallo issued a Report and Recommendation ("R&R"), recommending that the Court
24 grant the motion. Plaintiff filed objections to the R&R. Defendants did not file a
25 reply.

26 This Court, having reviewed *de novo* the Magistrate Judge's R&R and the
27 objections thereto, adopts the Magistrate Judge's recommendation and **GRANTS**
28

1 the Motion to Dismiss for Failure to State a Claim.¹ The Court finds no basis for a
2 certificate of appealability. The Clerk of Court shall enter judgment accordingly.

3 **IT IS SO ORDERED.**

4 Dated: October 11, 2017



Hon. Dana M. Sabraw
United States District Judge

23 ¹ The Court notes the claim provision of Cal. Gov. Code § 911.2 is inoperative in an
24 action brought under 42 U.S.C. § 1983, and the fact that Plaintiff did not allege
25 compliance with that provision is irrelevant to his claim under the Civil Rights Act.
26 *See Williams v. Horvath*, 16 Cal. 3d 834 (Cal. 1976); *Toscano v. Cty. of L.A.*, 92 Cal.
27 App. 3d 775, 784 (Cal. Ct. App. 1979). Here, Plaintiff expressly pleads only a claim
28 under § 1983. To the extent the Magistrate Judge construes the FAC to include a
claim for battery or assault, as he does in section IV(B)(v) Statute of Limitations, the
Court agrees with the Magistrate Judge's analysis in section IV(B)(iv) California
Government Claims Act.